IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.1179 OF 2004

Dattajirao S. Bhosale .. Appellant

vs.

Minakshi G. Deorumath & Ors. .. Respondents

Shri S.R.Ganbavale, Advocate for the Appellant.

CORAM : A.S.OKA, J.

DATED : 16th March, 2005.

P.C. :

1. Heard learned Counsel appearing for the Appellant. The Appellant is unsuccessful Plaintiff in the suit filed for declaration of ownership and for removal of encroachment. The Courts below have accepted the tile of the Appellant/plaintiff over the disputed suit passage. However, a finding has been recorded by the Courts below that Appellant/plaintiff has failed to prove the encroachment by the Respondents/Defendants on the property in dispute.

2. The competent Survey Officer under the

Maharashtra Land Revenue Code, 1966 was appointed as the Court Commissioner. The Court Commissioner carried out the measurements and survey. The map prepared by him shows that there is an encroachment on the property in dispute. However, the Courts below have discarded the evidence of the Court Commissioner and his report.

3. The learned Advocate appearing for the Appellant submitted that the Courts below have discarded the report of the Commissioner only on the ground that he carried out the measurements on more than one occasion. Placing reliance on the judgment of the learned Single Judge of this Court reported in 2004(1) Mh.L.J. page 138, Kisanlal Maniklal Rathi vs. Dinkar Yeshwant Patil, he submitted that when the Courts below found the evidence of the Commissioner was defective, Suo-moto powers under Order 26 Rule 9 ought to have been exercised by appointing another Survey Officer as Court Commissioner.

4. I have considered the submissions. The evidence and the report of the Commissioner is not

rejected only on the ground that he carried out the measurements on more than one occasion. Considering the various factors the Court have found that the evidence of the Commissioner was not trustworthy. The Appellate Court referred to admissions given by the Court Commissioner. The Court Commissioner admitted that he has not mentioned the scale on the map drawn on the original tracing paper. The Appellate Court also noted that the witness was not able to tell the width of the western wall even after allowing him to make the calculations. The Appellate Court also noted that the Commissioner has admitted that he has not mentioned the total area of encroachment. These are some of the factors which are considered by the Appellate Court for discarding the report of the Commissioner and his evidence. The findings of the Courts below as regards the report of the Court Commissioner and the map drawn by him are finding of facts based on appreciation of evidence and merely because another view is possible to be taken on the same evidence, interference under Section 100 of the Code of Civil Procedure, 1908 is not permissible.

4. The reliance placed on the decision of Kisanlal (Supra) is misplaced. In the present case the Officer of the Survey Department is appointed as Court Commissioner at the instance of the Appellant/Plaintiff. There is no subsequent application made by the Appellant/Plaintiff in the Courts below for appointing superior Officer of the Survey Department as Court Commissioner. The burden of proving the encroachment was on the Appellant/Plaintiff. He attempted to do so by appointing a Survey Officer as Commissioner. On the basis of the report of the Commissioner encroachment cannot be established. No fault can be found with the Courts below when suo-moto power under Order 26 Rule 9 of the Code of Civil Procedure, 1908 was not exercised by appointing another Survey Officer as the Court Commissioner. No substantial question of law arises. Second Appeal is therefore dismissed.

. No order as to costs.

(A.S.Oka,J.)